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No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE REV. VERNON ROBERTSON - - Petitioner

versus

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL & COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - - - - - - - - Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

EDWIN L. COHEN
COHEN & COHEN
155 Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202
(502) 584-8177
Counsel for Petitioner

September 29, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

(1) Is it good public policy for Courts to take an absolute stand of nonreviewability of eminent domain takings?

(2) What standards should the Courts apply when reviewing actions of the condemnor claimed "arbitrary" by the condemnee?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE REV. VERNON ROBERTSON - - *Petitioner*

v.

CITY OF LOUISVILLE, BY AND THROUGH
THE URBAN RENEWAL & COMMUNITY
DEVELOPMENT AGENCY OF LOUISVILLE - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, The Rev. Vernon Robertson, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Court of Appeals of Kentucky rendered on May 15, 1987.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky (not to be published) appears in the Appendix hereto. The Findings of Fact and Conclusions of Law rendered by the Jefferson Circuit Court also appears in the Appendix hereto.

JURISDICTION

The Judgment of the Jefferson Circuit Court taking the three buildings and land owned by Petitioner was

entered on May 13, 1986. The case was appealed to the Kentucky Court of Appeals; and on May 15, 1987, the Opinion of the Court of Appeals Affirming was rendered. A timely Motion for Discretionary Review was denied by the Supreme Court of Kentucky on July 30, 1987. The Judgment was final on the question of power to take in Kentucky, *Ratliff* v. *Fiscal Court of Caldwell County,* Ky. 617 S. W. 2d 36, 39 (1981). This Court's jurisdiction is invoked under 28 U.S.C. 1257.

Appeal is permissible where the ruling is fundamental to the future conduct of the case. *Forgay* v. *Conrad,* 6 How. 201, 204, 47 U. S. 201, 204, 12 L. Ed. 404 (1848).

> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

In accord is *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136, 46 S. Ct. 52, 70 L. Ed. 195 (1925).

CONSTITUTIONAL PROVISIONS INVOKED

Fifth Amendment to the Constitution:

Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, § 1, to the Constitution:

Amendment 14

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner is a priest in the Catholic Church, and Pastor of St. Martin's Church located near the subject properties. In the course of his duties he has opened Montessori Schools for all children in the neighborhood, increased church attendance, opened a day care center and rehabilitated housing for the elderly and the handicapped (TE, Vol. I, P. 2-5). The Petitioner's efforts to increase the public good in the neighborhood included opening a film company, a restaurant, and extended to cooperating with Southern Baptists in rehabilitating housing.

Petitioner has resisted these arbitrary takings of his properties because the results will be the destruction of good housing; an exodus of long settled owners and tenants from the neighborhood; the slashing intrusion of a roadway dividing the affected block into two triangles, neither of which would be attractive for residential housing; the deleterious effect on the Montessori Schools, church activities and the remaining housing in the neighborhood, and all done at great unnecessary expense (TE, Vol. I, P. 19-21).

Carl E. Kramer, Ph. D., an eminently qualified urban historian (TE, Vol. I, P. 26-27) stated that all three of the Petitioner's houses were on the National Register of Historic Places; Gray Street is narrow and easy for pedestrians to use; the Petitioner's buildings are on two corners, which anchor the blocks, and that the fundamental effect of the condemnation would

be to make it more difficult for children to go to school, for people to get to church and more difficult for the church to serve the people. His conclusions were that roads are as much a way of moving people as they are of moving vehicles and that the effect of the planned intrusion would wipe out a considerable number of viable housing units, weaken the overall social interaction and the general fabric of the community and make it much more difficult for St. Martin's Church to carry out its mission (TE, Vol. I, P. 33-39).

Sammie Lee is an eminently qualified civil engineer (TE, Vol. II, P. 2-4). He studied the proposed taking and concluded that the basic issues were whether or not the block of Gray Street to Chestnut Street east of Campbell was a viable neighborhood and is the other part of Gray Street between Shelby and Campbell also a viable neighborhood. He concluded that the subneighborhoods were viable and should be saved from the projected demolition, and change in the existing comprehensive plan for Shelby and Campbell Streets which have functioned very well for many years (TE, Vol. II, P. 9-11). Mr. Lee testified that the projected realignment would be detrimental to the affected properties and in fact destroy the fabric of several blocks (TE, Vol. II, P. 13-15).

Mr. Lee testified that the planned intrusion was arbitrary and done without consideration of the subneighborhoods. He further testified that government does not have unlimited resources and where, as here, individuals and groups are voluntarily using private

funds to maintain a neighborhood and improve it, that it is arbitrary to ignore the philanthropic efforts of the private sector (TE, Vol. II, P. 23).

The irony is that the projected traffic could be easily handled by an alternative shown on Petitioner's Trial Exhibit "C", which would not destroy the fabric of the affected block, avoid introducing extraneous traffic onto Gray Street, and would permit the existing arterial, Campbell, to function as a one-way street (TE, Vol. II, P. 15-16, and 26).

The simplest, cheapest alternative (make Chestnut Street two-way for a short distance) to this wholesale destruction of the subneighborhoods was never considered by the Respondent (TE, Vol. II, P. 79, L. 21, and P. 26, L. 7). This alternative was not considered by Respondent because it would require some automobiles to turn at the intersections (TE, Vol. II, P. 80, L. 3).

Although the church had been a public benefactor in that neighborhood for many, many years, the Respondent made no study of the cost, economic or otherwise, to the church (TE, Vol. II, P. 93, L. 10), nor to the Montessori Schools (TE Vol. II, P. 93, L. 21). It was either callous or ignorant for the Respondent not to realize the different safety requirements necessary for very young children compared with those in middle schools or high schools.

That intrusion is a 48 foot wide diagonal slash bisecting the block Campbell - Gray - Wenzel - Chestnut Street. The cost of acquisition of the land, relocation

of people and construction of roadway is estimated to be 2½ million dollars. The Respondent does not know what the estimate of future annual highway user costs will be (TE, Vol. II, P. 47-50). The real *raison d'etre* for the taking may be that the project is 75% paid for by Federal funds (TE, Vol. II, P. 59, L. 17), which, if not spent on road construction within Phoenix Hill, would not otherwise be available to the Respondent (TE, Vol. II, P. 63, L. 4).

One alternative which would leave the money unspent would have been to come up north on Campbell, make a turn onto Chestnut Street and then continue north on Chestnut (TE, Vol. II, P. 15-16). This was essentially the alternative that Mr. Lee proposed, which the Department of Transportation rejected because it was totally against any kind of turning movements on the road (TE, Vol. II, P. 80-82).

The Respondent seeks to destroy one residential block, adversely effect another residential block, and harm a major philanthropist because the Commonwealth seeks to avoid that some motorists may sometimes have to stop and turn at the intersection of Chestnut and Campbell Streets.

The planners said they considered the impact of the realignment on the subneighborhood, but could not find any such consideration in their final environmental impact study (TE, Vol. II, P. 85-87). They sacrificed the affected blocks without individual cost analysis (TE, Vol. II, P. 92-95).

Today the biggest government of all, the United States of America, has a budget deficit that threatens the economic and social fabric of the nation. Government should recognize that any philanthropic efforts from the private sector, including the church, is valuable and should be the object of cooperation.

The interest of the Respondent was to spend two and a half million dollars (TE, Vol. II, P. 63, L. 4), advance the interest of private real estate developers (TE, Vol. II, P. 30, L. 25) and assist merchants on the periphery of the neighborhood (TE, Vol. II, P. 32, L. 4, and P. 53, L. 15). The Chestnut Street realignment is not going to change the subneighborhood. It is going to destroy it. The long term Urban Renewal plan is to sacrifice the existing family homes, churches, schools and other infrastructure of the subneighborhood for redevelopment of the commercial strips to service the new apartment projects of private developers in the neighborhood (TE, Vol. II, P. 11, L. 3, through P. 12, L. 4).

One of the effects of the projected realignment is the development of one-way arteries adversely effecting the safe delivery and pick-up of very small children to the school rooms and also impairing the ability of the elderly to attend the restaurant and church which support the schools.

Considerable savings of public funds would result from leaving Campbell and Shelby Streets untouched as one-way arterials north and south (TE, Vol. II, P. 15, L. 4-13), and making Chestnut Street two-way for

east and west bound traffic for a short distance. It was arbitrary or capricious or an abuse of discretion by the Respondent to not consider the damage to the subneighborhood in this case.

FEDERAL QUESTIONS RAISED

The Petitioner, in the Court of first instance, raised the Federal questions of 5th Amendment and due process by his Answer (*City of Louisville* v. *The Rev. Vernon Robertson*, R. 47 and 48). That Answer, Paragraph 3, stated that the condemnation was a violation of certain sections of the Constitution of Kentucky and the 5th and 14th Amendments of the United States. Paragraph 4 of the Answer stated that the proposed taking was arbitrary, capricious and an abuse of discretion.

Petitioner, in his original Brief and Reply Brief to the Court of Appeals of Kentucky, raised and argued those Federal questions. Petitioner, in his Motion for Discretionary Review (page 7 thereof) to the Supreme Court of Kentucky, stated:

> "The specific reasons why the Judgment should be reviewed are: This is not a case of 'The king can do no wrong.' Section 2 of the Constitution of Kentucky, is a guarantee against the exercise of arbitrary power. Such an arbitrary taking as proposed here would also be in violation of the 5th and 14th Amendments of the Constitution of the United States."

REASONS FOR GRANTING THE WRIT

The writ should be allowed because:

(1) It is bad public policy for the Courts to take an absolute stand on nonreviewability of eminent domain takings. The holding of *Berman* v. *Parker,* 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954), is that:

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved.
>
> " . . . .
>
> "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

The presumption of validity resulting from public purpose has been widely and often unwisely applied.

The nonreviewability of eminent domain takings is not a narrow question affecting the few, but a matter of immediate, serious consequence to many. These modern eminent domain takings are not to develop vacant land. Now the power of eminent domain is

being used to entirely destroy viable, historic neighborhoods, in the dubious pursuit of so called "public purpose." As long as the trial courts incorrectly continue to hold that, "The King Can Do No Wrong," then the laymen will continue to say correctly "You Can't Fight City Hall."

The authoritative voice of the Supreme Court of the United States is badly needed to modify the holding of *Berman* v. *Parker, supra.* The law should not be that "The king can do no wrong." That is inconsistent with common sense and good public policy.

The judiciary should have some room to impose its judgment upon the condemnor, even after public use has been established. This is an issue of national application. A reform is needed. A uniform national law is needed. The lower courts should be advised that some proposed takings are indeed reviewable. The lower courts need to know what quantum of evidence is sufficient for judicial intervention.

(2) The standards the lower courts should apply when reviewing actions of the condemnor claimed arbitrary are suggested in the following cases:

Eminent domain is a harsh proceeding; and when a state exercises this power, it must do so in a manner which takes into consideration both the rights of the public and of the property owner, *Sapp* v. *Hillsborough County,* Fla., 262 So. 2d 256 (1972). The condemnor must ask what is the most compatible with the greatest public good and the least private injury. The question of least private injury demands as much investigation

as the element of public good, *Montana* v. *Danielson,* Mont. 409 P. 2d 443 (1965). It is arbitrary and capricious for an agency of Government not to take into account all relevant factors, including the least private injury, in making its determination, *State, etc.* v. *0.644 Acres,* Alaska, 613 P. 2d 829 (1980). The condemnor abused its power in considering only the most direct and economic route and failing to weigh safety and impact of proposed project on the environment, *Florida Power Corp.* v. *Gulf Ridge Council,* Fla. App., 385 So. 2d 1155 (1980).

In *Knappen* v. *Div. of Admin.,* Fla., App., 352 So. 2d 885, 890, 891 (1977), the court reversed a taking because it was unnecessary, and for the purpose of spending Federal funds. In *Madison County* v. *Elford,* Mont. 661 P. 2d 1266, 1271 (1983), the court reversed the taking because the condemnor did not provide a comparison of the costs of two alternative choices.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

EDWIN L. COHEN
COHEN & COHEN
155 Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202
(502) 584-8177

Counsel for Petitioner

September 21, 1987

APPENDIX

OPINION RENDERED: MAY 15, 1987; 10:00 A.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

86-CA-1448-MR

THE REV. VERNON ROBERTSON - - - *Appellant*

v.

CITY OF LOUISVILLE, BY AND THROUGH URBAN RENEWAL & COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE, CITY OF LOUISVILLE and COMMONWEALTH OF KENTUCKY, COUNTY OF JEFFERSON - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Earl O'Bannon, Jr., Judge
Action No. 85-CI-009790

AFFIRMING

BEFORE: HOWERTON, CHIEF JUDGE, CLAYTON and DYCHE, JUDGES.

DYCHE, JUDGE. Rev. Vernon Robertson appeals from an order of the Jefferson Circuit Court which authorized the Urban Renewal and Community Development Agency of Louisville's [hereinafter "Agency"] condemnation of three tracts of real estate owned by Rev. Robertson. The three tracts, along with several others, were taken as part of the "Phoenix Hill" redevelopment, which includes a rerouting of Chestnut Street. Appellant maintains that the taking was arbitrary, capricious, or an abuse of discretion. These grounds, if proven, will merit judicial intervention in this

type case. *Conrad* v. *Lexington-Fayette Urban County Government,* Ky., 659 S. W. 2d 190 (1983).

In attempting to show the abuse of discretion, appellant, who is pastor of St. Martin's Church in the affected area, cites his noteworthy accomplishments in improving the community. These include opening Montessori Schools, increasing church attendance, opening a day care center, establishing a fine restaurant and a film company, and working toward rehabilitating housing for the elderly and handicapped. In short, Rev. Robertson has given of himself for his community in a manner matched by very few, if any.

He contends that the proposed actions of the Agency are arbitrary, capricious, or an abuse of discretion, in that the neighborhood for which he has worked so selflessly will be severely harmed, if not destroyed. In support of that contention, appellant maintains that the Agency considered no alternatives to its proposed plan which would have a less deleterious effect on his neighborhood.

The record, however, does not bear Rev. Robertson out. We agree with the trial court that the Agency did consider alternatives before deciding on the present plan. Whether or not the correct choice was made is not ours to judge. As the trial court said in its opinion,

> The Court's function is not to bestow or withhold a Good Housekeeping Seal. Condemnation is a harsh procedure, particularly when more than monetary compensation is at stake. The Court acknowledges the City's worthwhile stake in the project. The Court acknowledges Rev. Robertson's stake in this controversy, but concludes that the evidence is insufficient for judicial intervention.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

Attorney for Appellant

EDWIN COHEN
COHEN & COHEN
155 Legal Arts Building
Louisville, Kentucky 40202

Attorney for Appellee, Urban Renewal and Community Development Agency of Louisville

PAUL F. VISSMAN
KAREM & KAREM, Attornyes
Suite 312—Speed Building
333 Guthrie Green
Louisville, Kentucky 40202

Attorney for Appellee, Commonwealth of Kentucky, County of Jefferson

LAWRENCE J. PHILLIPS
1001 Fiscal Court Building
Louisville, Kentucky 40202

Attorney for Appellee, City of Louisville

WILLIAM P. O'BRIEN
City Hall, Room 2
601 West Jefferson Street
Louisville, Kentucky 40202

SUPREME COURT OF KENTUCKY

87-SC-405-D
(86-CA-1448-MR)

THE REV. VERNON ROBERTSON - - - - *Movant*

v.

THE CITY OF LOUISVILLE, ETC., ET AL. - - *Respondents*

Jefferson Circuit Court
#85-CI-9790

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED July 30, 1987.

(s) Robert F. Stephens
Chief Justice

No. 85CI09790

JEFFERSON CIRCUIT COURT

FIFTH DIVISION

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - - - *Plaintiff*

v.

THE REV. VERNON ROBERTSON, Et Al. - - *Defendant*

OPINION AND ORDER

This is a suit by the City's Urban Renewal Agency to acquire by condemnation certain tracts of land as part of the "Phoenix Hill" redevelopment. The particular tracts will serve as a part of the rerouting of Chestnut Street.

Rev. Robertson, an owner of three houses in the affected area resists the action claiming that the condemnation is not a proper taking for the public use and that the action of the City is arbitrary, capricious, and abuse of discretion.

Rev. Robertson is the pastor of St. Martins Church which is in the adjacent area to the land sought to be taken. By virtue of his pastorate he is also a resident in the adjacent area. He purchased the particular lots being condemned after the Redevelopment Plan was approved by the Board of Aldermen.

The overall Phoenix Hill development intends to provide revitalized housing and neighborhood, and/or creation of a new neighborhood, in the inner eastern side of downtown Louisville. The Plan includes the rerouting of certain streets to insulate the overall area from arterial traffic. In so doing the rerouting will require the removal

of certain houses, including those which are the subject of this lawsuit.

The area in question raises two aspects to Rev. Robertson's contest in this suit. First the block in which the properties are located will be demolished, and secondly the effect of the plan by rerouting traffic onto Gray Street where his Church and related activities are located.

In this section of the City, Shelby Street serves as a one way south bound arterial street and Campbell serves as a one way north bound route. The Plan intends to preserve this concept of north and south one way arterial traffic. After several trys, the Court gives up on a word discription of the rerouting and any alternatives without a map. Suffice to say that the Plan will reroute south-west bound Chestnut Street traffic through the area in question, and eject that traffic on to the now little trafficed Gray Street, past the Church, and then left and south bound on Shelby Street.

Rev. Robertson's concerns are that the rerouting will destroy several houses which are on the Federal Landmark Registry; it will reroute south-west bound Chestnut Street traffic on to Gray Street where his Church, school, and other activities are located; and lastly, or perhaps foremost, that the action will effectively destroy the revitalization of the Church and nearby community.

The "Phoenix Hill" overall area is actually comprised of several historical sub communities. Many are of German and Irish origin. Many areas serve as stable low cost housing for basically a blue collar home owner community. The 150 year old community, formally known as "Uptown", contained the Phoenix Hill Brewery from the Civil War until the Prohibition.

Rev. Robertson was assigned to St. Martins in 1978. For any reviewer of this decision, the Court refers to a history of this Church and it's activities in the community

which has been filed as a part of the pretrial proceedings. In any event at that time the Church had only 30 to 40 parishioners. Since that time the Church has attracted more people, even outside the area. The activities of the Church have included many religious and social and community activities, including the Afro-German Tea Room, a day center, a Church film company, a non profit organization to rehabilitate houses in the area, inter faith activities, etc., and of course Montessori School.

Dr. Carl Krammer, a consultant expert concerning historic preservation, testified for the Defendant about the history and quality of the neighborhood and the structures and houses in this area. Many of the structures date back 100 years. He testified that the lack of heavy traffic has the effect of allowing people to cross streets and inter react. He testified that St. Martins has an importance larger than a religious one, it being a center of institutional and neighborhood activity and stability. He testified that the re routing will diminish the social interaction and fabric of the community. He expressed concern that the condemnation will also extinguish viable low cost living units. He conceded that the particular block in question will require demolition if about six to seven houses.

Mr. Sammy Lee, a civil engineer with experience in related public service, testified as to a proposed alternative for the rerouting. He also expressed concern that the Plan ignored the viable neighborhood and basically re affirmed the concerns of Rev. Robertson and Dr. Krammer. He did acknowledge that in the last ten to fifteen years there has been a 2/3 population loss.

Testifying for the City were Mr. Henry Dosker, assistant director of the Office of Economic Redevelopment; Gary Barta, who represented the Memphis consulting firm acting as project manager for the Plan, and Mike French, the director of Public Works. Without reciting in detail

all of their testimony, the bottom line appears to be that something had to be sacrificed for the overall Plan. That evidence will be mentioned later.

The Court has reviewed the cases cited by both parties. Indeed the law is not in question. Land taken must be for a public purpose and must be done in a manner which is not arbitrary or as a result of an abuse of discretion.

The Defendant would be hard pressed to claim that the taking is not for a public purpose. The Phoenix Hill project does not even rub against Rev. Robertson's own intentions and work for and in the area.

The Defendant does submit that the rerouting is arbitrary and an abuse of discretion.

In making such contention the Defendant has the burden. Once public purpose has been established the judiciary has little room to impose it's judgment upon legislative discretion in such matters as specific details or whether or not another route could be workable.

On the other hand in balancing the public good and the injury of the property owner, the condeming authority may become arbitrary if the rights of the owner are not considered. It is upon this premises that the Court gleans that the Defendant attempts to make his case. Did the project planners consider the impact upon Rev. Robertson's historic properties and his adjoining Church-community activities and the "sub-community"? Were alternatives considered?

In keeping with Federal Historic Registry guidelines, consideration was given to "moving" the houses, but such was cost prohibitive.

The purpose of the rerouting was discussed before. The Defendant challenged the City's witnesses to recall any specific consideration of the impact. While no specific reference could be found in the study summary, it was apparent, particularly from Mr. Dosker's testimony, that

there was awareness and decision that sacrifices would be made in this "sub-community".

The final Chestnut Street rerouting was adjusted with a curvature to salvage certain houses. The State Department of Transportation, which will have obligations of future maintenance of Chestnut Street, set up requirements that rerouting be done with as few "turns", as possible; such "turns" affect the polution around areas and the erosion of the roadways. The Court heard evidence that the proposed plan affecting the block in question would cost more however the rerouting best served the Plan for the overall project. (There was even implication that the Federal money for the rerouting, if not used for the roads, could not be used for other project uses).

The Court heard evidence as to the several routing alternatives which were considered. Of the alternatives were a routing to pass by more commercial lots rather than residential. The Defendant suggested dispute as to which route had more or less commercial units.

Even if Mr. Lee's specific idea was not considered by the planners, it too was not ideal because of the State's requirements and the Chestnut Street "one-way - east" concept. There was further evidence of consideration by the planners that the east side of the "new" Chestnut Street would be in the "flood area", and likely to be utilized for commercial uses versus residential use.

The foregoing may be an incomplete summary of the evidence, but the Court finds that the evidence is that the project planners considered the impact of the rerouting upon the affected area and areas.

The Court's function is not to bestow or withhold a Good Housekeeping Seal. Condemnation is a harsh procedure, particularly when more than monetary compensation is at stake. The Court acknowledges the City's worth while stake in the project. The Court acknowledges Rev.

Robertson's stake in this controversy, but concludes that the evidence is insufficient for judicial intervention.

(s) Earl O'Bannon, Jr.
Earl O'Bannon, Jr., Judge
May 13, 1986

ORDER

IT IS ORDERED that Plaintiff's condemnation of the property in question be deemed authorized by law and Defendant's defenses to the taking be dismissed.

This is an appealable order.*

(s) Earl O'Bannon, Jr.
Earl O'Bannon, Jr., Judge
May 13, 1986

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*Ratliff vs. Fiscal Court of Caldwell Ctiy
617 S.W.2d 36 (Sup. Ct. 1981)

cc: Edwin Cohen
Paul F. Vissman
William O'Brien
Lawrence Phillips

87-539
No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE REV. VERNON ROBERTSON - - Petitioner

versus

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL & COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - - - - - - - - - Respondent

---

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

PAUL F. VISSMAN
KAREM & KAREM, ATTORNEYS
Suite 312—Speed Bldg.
333 Guthrie Green
Louisville, Kentucky 40202
(502) 587-6659
Counsel for Respondent

October 20, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

HPP

QUESTIONS PRESENTED FOR REVIEW

(1) Is it good public policy for Courts to take an absolute stand of nonreviewability of eminent domain takings?

(2) What standards should the Courts apply when reviewing actions of the condemnor claimed "arbitrary" by the condemnee?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE REV. VERNON ROBERTSON - - *Petitioner*

v.

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Respondent, City of Louisville, by and through the Urban Renewal and Community Development Agency of Louisville respectfully submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner, the Rev. Vernon Robertson.

COUNTERSTATEMENT OF MATERIAL FACTS

This matter involves Respondent's, Urban Renewal and Community Development Agency of Louisville (hereinafter referred to as "Urban Renewal"), condemnation of three residential properties owned by Movant, Father Vernon Robertson, Pastor of St. Martin's Church which is located nearby. The testimony of Father Robertson (TE Vol. I, p. 23), and the

record (Respondent's original Complaint, Respondent's Appendix), clearly show that Movant purchased these properties *after* final approval of this plan pursuant to KRS 99.370. Although Movant complains that he was not specifically consulted about this project, he did attend meetings (TE Vol. I, p. 5) and knew enough about this project to purchase these properties within 3 weeks of the plan's approval. There is uncontroverted evidence that numerous neighborhood groups joined with public officials in working on this plan from February of 1979 until its final approval in March of 1982 (TE Vol. II, p. 66).

Neither Movant nor his witnesses have denied that this area is "blighted", nor have they alleged that the ordinance declaring this area an Urban Renewal Project Area was arbitrary or made in bad faith. In fact, Movant himself has tried to achieve the same goals of redevelopment and revitalization of this area as Respondent. His witnesses, Carl E. Kramer and Sammie Lee, both admit the mixed uses including commercial and residential in this area (TE Vol. I, p. 42-46) and the population loss suffered by this area (TE Vol. II, p. 24). While Movant states that there are not "commercial establishments on the southside of Gray between Shelby and Clay", he does admit that at least half of this block has a commercial use, being a surface level parking lot for the nearby commercial establishments (TE Vol. II, p. 110), as does his expert, Dr. Kramer (TE Vol. I, p. 46). Neither of Movant's expert witnesses presented their testimony or alterna-

tive plans to any of the reviewing bodies prior to the Urban Renewal Plan approval, on March 11, 1982, by the Board of Alderman of the City of Louisville (TE Vol. I, p, 47) and (TE Vol. II, p. 27).

In fact Mr. Lee testified that he did not really examine any of the Urban Renewal Plan because he did not consider it an issue (TE Vol. II, p. 26). Movant is clearly in favor of redeveloping this neighborhood. He just feels funds earmarked for this road should be spent some other way (TE Vol. I, p. 21). Movant's expert witness, Sammie Lee, takes the position that the existing street layout is sufficient in this area while conceding the massive population loss and other problems which exist in the area (TE Vol. II, p. 24-26).

Unfortunately neither of Movant's expert witnesses studied this area prior to 1985 after substantial improvements had been made as part of the Urban Renewal Plan.

Urban Renewal's witness, Henry Dosker, Assistant Director of Louisville and Jefferson County Office of Economic Development, testified about effort made during this process to save structures at 910-912 Chestnut Street originally scheduled to be demolished (TE Vol. II, p. 37). In addition, Movant's expert on historic preservation, Carl Kramer, testified that in fact it appeared that Respondent had approval to remove any structures it felt necessary pursuant to an agreement with the National Registry (TE Vol. I, p. 42-44).

Mr. Dosker testified to the redevelopment and rebirth that was already in progress in this area. (TE Vol. II, p. 30-31 and p. 51).

Gary Barta, the qualified planning consultant who worked on this Plan, testified concerning the efforts made by the planners and neighborhood groups involved to protect the residential core of this neighborhood (TE Vol. II, p. 67) and the nearby Clarksdale Public Housing Project from traffic (TE Vol. II, p. 69). In addition this route also utilized property located on the one hundred year flood plain and therefore ineligible for FHA insured rehabilitation loans (TE Vol. II, p. 74).

Movant has made much of the fact that this road will cause an increase in traffic at the Montessori School. However, Mr. Barta noted that most schools located in urban areas are on busy streets (TE Vol. II, p. 94).

There was *no* evidence presented at the trial concerning safety hazards to either school children or the elderly in getting too or from this church.

Mr. Michael French, a qualified engineer, who is also the City of Louisville Director of Public Works, testified that other alternate routes for this road were investigated and considered during the lengthy planning process. For various reasons these alternatives were discarded (TE Vol. II, p. 104). Both Mr. French and Mr. Barta testified that the impact on this block was considered, but for the project area as a whole, this was the best route (TE Vol. II, p. 102). In ad-

dition, the costs of the various alternatives were considered though, as Movant points out, not published in the Environmental Impact Statement. However, as Mr. Barta explained, the Environmental Impact Statement is prepared only to satisfy Federal Funding requirements and not as part of the KRS 99.370 approval process for this project. The court found that evidence showed that "the project planners considered the impact of the rerouting upon the affected area and areas" (Opinion and Order dated May 13, 1986, p. 6).

The record clearly illustrates a lengthy, careful planning process which was employed when planning not only the Urban Renewal Project, but the route of this roadway. The testimony of Mr. Lee for Movant and Mr. Barta and Mr. French for Respondent, shows that this route is neither the cheapest or easiest "quick fix" for the problems of this area. Rather it is the best alternative solution to the many, varied, and often conflicting problems which are being addressed by the Urban Renewal Project Plan for this entire neighborhood area.

REASON FOR DENYING THE WRIT

(1) The Court below did not take a position of absolute non-reviewability as alleged by Petitioner in his Petition for Writ of Certiorari.

While agreeing with this Court's decision in *Berman* v. *Parker,* 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954), that once public use or public purpose has been decided it is a legislative function to decide land use

and need for a particular project, the Court below did review Petitioner's claim that this taking was arbitrary, capricious or an abuse of discretion.

Both the Jefferson Circuit Court and Kentucky Court of Appeals correctly ruled that when Petitioner raised this claim it was his burden to prove the acts which he alleged. *Louisville and Jefferson County Metropolitan Sewer District* v. *Joseph E. Seagram & Sons,* Ky., 211 S. W. 2d 122 (1944).

Petitioner totally failed to meet this burden of proof. There was *no* evidence that this taking was arbitrary, capricious or an abuse of discretion.

This Court's ruling in the *Berman* case has been repeatedly upheld because such determinations are inherently vested in the legislative branch of government. *Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 104 S. Ct. 2321, 81 L. Ed. 186 (1984), *Ruckelshaus* v. *Monsanto Company,* 467 U. S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984).

It is clear in this case that Petitioner simply wished to substitute his judgment as to what route this road should follow for that of the legislature.

(2) The Lower Courts have applied correct standards in reviewing the action of Urban Renewal claimed arbitrary.

Petitioner cites the Florida decision of *Sapp* v. *Hillsborough County,* (Fla.), 262 So. 2d 256 (1972) as the standard to be applied in reviewing eminent domain proceedings. However, the Supreme Court of Florida reversed that decision in *Hillsborough County*

v. *Sapp,* (Fla), 280 So. 2d 443 (1973) and set out the correct standard of review in these cases:

> "When the trial court approves the determination of reasonable necessity and finds no abuse of discretion, a reviewing court is then limited to deciding whether or not there was competent substantial evidence to support the decision of the trial court." (at p. 445)

This is the same standard applied by Kentucky Courts in *Commonwealth, Department of Highways* v. *Burchatt,* Ky., 367 S. W. 2d 262 (1963), and *Commonwealth, Department of Highways* v. *Vandertoll,* Ky., 388 S. W. 2d 358 (1964).

The record in this case clearly reflects a detailed, careful planning process intended to revitalize the entire blighted area with as little private injury as possible given the overall goal. The various allegations concerning the taking made by Petitioner were not supported by the facts. That is where his case fails. Given the opportunity he was unable to susbtantiate any of his claims of abuse of discretion and, therefore, the law as set out in *Berman* v. *Parker,* 348 U. S. 26 (1984) (at p. 35-36) does apply in this case.

CONCLUSION

For the reasons stated herein and based upon the authorities cited, the Respondent, City of Louisville, by and through the Urban Renewal and Community Development Agency of Louisville respectfully asserts that Petitioner has not demonstrated the "special and

important reasons" for granting a writ of certiorari pursuant to Rule 17 of the Rules of the Supreme Court of the United States. Therefore Respondent respectfully requests that this Petition be denied.

Respectfully submitted,

PAUL F. VISSMAN
KAREM & KAREM, ATTORNEYS
Suite 312—Speed Bldg.
333 Guthrie Green
Louisville, Kentucky 40202
(502) 587-6659 or 582-1171

Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been served upon all counsel of record by depositing the same in the United States Mail, first class postage prepaid, to the following persons on the 20th day of October. 1987.

Edwin L. Cohen
Cohen & Cohen
Counsel for Petitioner
155 Legal Arts Building
200 South Seventh Street
Louisville, KY 40202

William P. O'Brien
Counsel for City of Louisville
City Hall, Room 2
601 West Jefferson Street
Louisville, KY 40202

Lawrence J. Phillips
Counsel for Commonwealth of Kentucky
County of Jefferson
1001 Fiscal Court Building
Louisville, KY 40202

Paul F. Vissman

Paul F. Vissman

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-539

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE REV. VERNON ROBERTSON - - Petitioner

versus

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL & COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - - - - - - - - - Respondent

Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

REPLY BRIEF FOR PETITIONER

EDWIN L COHEN
COHEN & COHEN
155 Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202
(502) 584-8177
Counsel for Petitioner

October 30, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-539

THE REV. VERNON ROBERTSON - - *Petitioner*

v.

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PETITIONER

May it please the Court:

This is a case in which Petitioner, a priest in the Roman Catholic Church, and Pastor of St. Martin's Church, located near his properties, has resisted Respondent's eminent domain taking as arbitrary because the results, at great unnecessary expense, will be the destruction of good housing; an exodus of long settled neighbors and tenants from the neighborhood; the slashing intrusion of a roadway dividing the affected block into two triangles, neither of which would be attractive for residential housing; the deleterious effect on the remaining housing, and Montessori Schools and other church activities in the neighborhood.

The purpose of this Reply Brief is to point out that the Respondent made an incorrect and unfair statement in its Counterstatement of Material Facts, page 4 of its Brief, namely:

> "There was *no* evidence presented at the trial concerning safety hazards to either school children or the elderly in getting too (sic) or from this church."

The Transcript of Evidence is to the contrary. Father Robertson testified that more traffic will affect not only the schools, but people visiting the church sponsored restaurant and coming to church for parochial reasons (TE, Vol. I, p. 20, included in Appendix). The urban historian, Dr. Kramer, testified that the existing Gray Street was a narrow street without a heavy degree of traffic and that it was easy for people to move back and forth across that street and into the surrounding buildings (TE, Vol. I, p. 34, included in Appendix) and that the proposed connector would make it more difficult for people to get to church (TE, Vol. I, p. 37-39, also in Appendix). The traffic engineer, Mr. Lee, also testified that the proposed plan would be detrimental to the properties because it would change the character of them by increasing traffic on Gray Street (TE, Vol. II, p. 13-14, reproduced in Appendix).

Respectfully submitted,

EDWIN L. COHEN
COHEN & COHEN
155 Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202
(502) 584-8177

Counsel for Petitioner

October 30, 1987

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TRANSCRIPT OF PROCEEDINGS

Testimony of Father Robertson

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are made into less attractive things. You have a pile of traffic going through with houses on either side that won't have the same privacy that they've had before. And I wanted to see that maintained.

Q. Do you have an opinion regarding the effect of this, this proposal on of the Montessori School?

A. Well, it's hard to determine exactly what they're going to do with the traffic. It appears to me that the traffic is going to be increased; that we now will have a corridor on Gray Street. The Montessori School has a 50 children that wander in and out and sometimes use the hall across the street, and we have to be careful as it is with traffic moving. What I gather—it's sometimes hard to know whether it will be one-way or two-way, parking or no parking, but just the whole thing of dealing with much more traffic will affect not only the school but people stopping at the restaurant and coming into the church to visit for parochial reasons or—it just turns us into a corridor instead of a city block where people can meet and talk and go to church and do things that I think they have been doing there for quite a while.

Q. Do you have any opinion on any other effects of the realignment?

Mr. Vissman: Same objection.

The Court: Continue. Go ahead.

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Testimony of Dr. Kramer

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living in a shotgun house next to a reasonable prosperous merchant living in a two-story Italianate house.

Q. What observations did you make with respect to the sub-neighborhoods, particularly the block on which Father Roberts (sic) three properties are, now four properties, and with respect to the contiguous block where the church is?

A. That again, those blocks have a large degree of internal integrity; that there is a strong tie with the church. The street, Gray Street was never, to at least my finding, a street that carried a heavy degree of traffic. It was a street that was built at a time that fairly narrow streets carried as much human as they carried vehicular traffic. Therefore were a nub of social interaction as well as transportation, or vehicular transportation. Therefore, it's a street that had the effect, and I clarify that as opposed to necessarily intent, to make it easy for people to move back and forth across the street and interact with each other and with the surrounding buildings.

Q. Do the three properties that are the subject of this lawsuit owned by Father Robertson play any role in the fabric of the neighborhood?

A. Certainly.

Q. Will you explain that?

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A. I think the fundamental effect would be to severely diminish social interaction, movement back and forth is difficult. It would be difficult to move, or much more difficult to move across that 40 feet of concrete as it goes through the community. It would make it more difficult

to have social interaction, for people to move to and from either one part of the block to the other. Of course, it would eliminate part of the considerable number of the people who are there and reduce the number of people who are there to interact. It would make it more difficult for them to get to the church, more difficult for the church to carry out its mission to the people it is there to serve.

Q. What, if anything, would this do to the integrity of the block?

A. I think it would fundamentally alter the integrity of the block.

Q. For the better or for the worse?

The Court: I somehow read that in—

The Witness: It would be a considerably dilatorious effect on the block. Certainly by eliminating the housing, the affordable housing for the people in the neighborhood, but making it much more difficult for them, those who remain.

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By Mr. Cohen:

Q. What would this proposed connector do with respect to the St. Martin's neighborhood?

A. I think it would make it more difficult for the people who remained in the neighborhood to get to the church effectively.

Mr. Vissman: Your Honor, if you'll note my continuing objection. This is not historic, it's moving people.

The Court: You can look out there and see what the road's going to do.

The Witness: I think historically you can say that roads are as much a way of moving people as they are of moving vehicles. And large expansions of concrete, wider streets, heavily trafficked streets make it difficult for people to move from one side to the other, especially if children are moving.

There is a pattern that once you get a certain degree of traffic, it simple makes it more difficult for people to get across the street.

The Court: You know, I think I could have testified to that, in that one area.

By Mr. Cohen:

Q. Have you come to any conclusion about

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what the overall effect of this proposed corridor and realignment will have on this neighborhood if it's built?

A. I think, in general conclusion, it would have an effect of generally wiping out a considerable number of viable, working-class housing units. It would weaken the overall social interaction and the general fabric of the community and make it much more difficult for St. Martin's Church to carry on its mission in that community?

Q. Is there anything else that you would like to add that you think might be of some of aid to the court in deciding the question before it?

A. I think I have just about summed up—

The Court: You may thing of something again when Mr. Vissman . . .

How many questions do you have?

Cross-Examination by Mr. Vissman:

Q. Doctor Kramer, when you talk about the neighborhood, you're talking about this particular block we're discussing? You're not talking about the entire Phoenix Hill neighborhood, are you?

A. Generally speaking, I'm talking about

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Testimony of Mr. Lee

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under the plan or is this existing street just one way?

The Witness: You talking about Gray between Campbell and Shelby?

The Court: Where it drops off coming south and then. (Indicating)

The Witness: If you're coming south and then west, it would be two-way at this point down to the intersection of the new street and Gray.

The Court: Right.

The Witness: At my point, it's my understanding, it would be one-way from Gray west to Shelby.

The Court: It's not going to be that enlarged street?

The Witness: It's my understanding that there is no—but it's presently wide enough for two lanes in each direction plus parking on one side. It would be just reversing the flow and directing traffic into it which does not now exist.

The Court: I understand.

By Mr. Cohen:

Q. What would be the effect of this proposed plan on the properties on either side of Gray Street between Campbell and Shelby?

A. Well, I think it would be detrimental to those properties. It would change the character of them by having traffic routed through the street of a character that does not now exist, with trucks, other kinds of traffic. Granted, they're not prohibited today, but it's not an arterial classification of street, it's strictly a local street that serves. So it would, in my opinion, be detrimental to those properties.

Q. What would be the effect of this proposed plan on the area on the east side of Campbell from Gray to Chestnut.

A. Well, I think the—first the taking of a viable residential structure on the corner begins to destroy the fabric of it for a residential neighborhood. That is a brick house that could be maintained in a very attractive condition. There is a house at 909, it's freshly painted, very neat, so there is interest in the neighborhood as a residential one but I have concern that by making this cut through, cutting off the back corners of those lots, of running a major four-lane arterial through that block is going to make it much less desirable as a residential enclave to serve as a needed housing where, as I have said before, intrastructure exists, or have need for housing that is

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